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Supreme Court of the United States

OCTOBER TERM, 1950

No. 27

STANDARD OIL COMPANY OF NEW JERSEY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, as Owner of the United States Ship *YMS-12.*

No. 28

STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steam Tanker *John Worthington,*
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported in 81 F. Supp. 183 and appears at pages 78-95 of the record.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 178 F. 2d 488 and appears at pages 102-114 of the record.

These cases were consolidated for purposes of trial and appeal, R. 95, 104.

Jurisdiction of This Court

This Court issued writs of certiorari on June 5, 1950, 339 U. S. 977.

The jurisdiction of this Court rests upon the provisions of Title 28 U. S. Code, Section 1254.

Questions Presented

1. Is a collision between a war vessel engaged on a warlike operation and a merchant vessel, with fault on the part of both vessels, a consequence of the warlike operation of the war vessel?

2. If the answer to the foregoing question is affirmative, is the collision liability of the owner and operator of the merchant vessel covered by the war risk insurance here involved?

3. If the answers to both the foregoing questions are affirmative, is respondent liable under such war risk insurance to indemnify petitioner against the costs of defense of the collision libel?

Statement of the Case

These actions in Admiralty arose out of a collision at sea between the steam tanker *John Worthington*, hereinafter called the *Worthington*, and United States Navy

Minesweeper *YMS-12,* hereinafter called the *YMS-12,* between 5 and 6 A. M. on December 16, 1942.

The *Worthington* did not sustain any damage in the collision. The *YMS-12* sustained serious damage.

There is no issue as to fault in the collision. It was stipulated before trial that the collision was contributed to by fault on the part of both vessels under the circumstances. Thus petitioner was liable in the first instance for one half of the *YMS-12's* collision damages.

The only question before this Court is as to war risk insurance of petitioner's collision liability with respect to the damages sustained by the *YMS-12.*

The war risk insurance of petitioner with respect to the *Worthington* was issued by the Government, respondent herein.

In No. 27 the District Court sustained petitioner's defense, and in effect allowed petitioner a full set-off against said liability, and in No. 28 allowed petitioner to recover the costs of defense of respondent's collision libel (No. 27), by reason of said war risk insurance.

The United States Court of Appeals for the Second Circuit reversed on the ground that the collision was not within the terms of said war risk insurance and that thus it was unnecessary to consider whether petitioner's resulting liability is insured thereby.

(a) *The Pleadings*

Respondent's collision libel filed against petitioner in No. 27 claims approximately $150,000 for damages sustained with respect to the *YMS-12. Libel,* Article Fourth, R. 5.

Petitioner's answer to said collision libel pleaded a defense based on the terms of war risk insurance issued by

respondent to petitioner with respect to the *Worthington*, and accordingly prayed dismissal of the collision libel by reason of respondent's liability to petitioner under said war risk insurance. *Answer*, Article Eighteenth and concluding paragraph, R. 14-15.

In No. 28 petitioner's cross-libel claims indemnity pursuant to said war risk insurance with respect to any loss which petitioner may sustain by reason of liability arising out of said collision, and for any and all costs which petitioner has incurred or shall incur in defense of the collision libel in No. 27. *Libel*, Articles Eighteenth and Twenty-first, R. 25-26.

(b) *The Collision*

On a stipulation of facts, the District Court, with the consent of all parties, found the facts as to the collision as follows (italics ours):

> (1) At all material times the United States of America owned and operated the United States Ship *YMS-12*, a mine sweeper of the United States Navy, manned and commanded by the United States Naval personnel, and Standard Oil Company of New Jersey owned and operated the Steamship *John Worthington*, a tank ship.
>
> (2) Between 5:00 and 6:00 a.m. on December 16, 1942, a collision occurred between the United States Ship *YMS-12* and S. S. *John Worthington* in buoyed channel otherwise known as the swept channel in the approaches to the New York harbor. Said channel was marked by center line bucys from a point about twenty-three miles off Point Pleasant on the New Jersey Coast at Buoy A, Lat. 40 deg. 04′ 50″ N; Long. 73 deg. 31′ 45″ W, to a point in vicinity of Ambrose Light Vessel, at Buoy I, Lat. 40 deg. 26′ 46″ N; Long. 73 deg. 51′ 51″ W.

(3) At the time of the collision the *YMS-12* was part of a mine sweeping formation and was proceeding seaward with her mine sweeping gear streamed and displaying three all around green lights designating mine sweeping vessels towing mine sweeps in accordance with notice to mariners issued July 1, 1942, in addition to her regular running lights. Said mine sweeping formation consisted of three mine sweepers which were engaged in mine sweeping in said buoyed channel. The U. S. S. *YMS-105* was the guide ship of the formation, which was proceeding on the easterly side of the swept channel, keeping the mid-channel buoys on the port hand. The *YMS-12* was stationed several hundred yards on the starboard beam of the *YMS-105* and the third vessel in the formation, the USS *AMC-95,* was echelon to the right of the guide ship in a position approximately a half mile astern of and midway between the *YMS-105* and the *YMS-12.*

(4) At the time of the collision, SS *John Worthington* was outbound from New York in ballast and was proceeding to sea in convoy, displaying regular and proper lights. The weather was clear, visibility good.

(5) The aforesaid collision was contributed to both by fault in the navigation of SS. *John Worthington* and fault in the navigation of the United States Ship *YMS-12,* consisting of failure on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship *under the circumstances.*

(6) SS. *John Worthington* did not sustain any physical damage but the *YMS-12* did sustain damage as a result of the collision.

Findings of Fact, R. 79-80.

It was conceded by the Government that at the time of the collision the *YMS-12* was actually engaged in the war-

like operation of mine sweeping, R. 40, 42, and it was so found by both Courts below. R. 86, 112.

(c) *The Insurance*

At the time of the collision the *Worthington* was under requisition time charter to the United States. Clause 20 of Part II of that Charter provided that the United States, as charterer, should provide and pay for the war risk insurance on the vessel, and that petitioner, as owner, should assume or insure against all other risks or liabilities of whatever nature including those of a marine hull nature. *Charter*, Ex. 1A, Part II, p. 9. R. 70, in evidence as Exhibit A attached to Stipulation of Facts, Government Exhibit 1, at R. 32. The full text of the charter will be found in the exhibit volume, the photostat being marked Exhibit A, headed Form No. 102, *Warshipoiltime* 5/22/42, Counterpart III, Parts I and II.

The insurance of damage to a vessel is usually covered by the *Adventures and Perils Clause* of the ordinary marine hull policy. The insurance of liability for damage to other vessels is usually covered by the *Collision Clause* of the ordinary marine hull policy.

Any claim for loss, damage or expense caused by or resulting from the consequences of hostilities or warlike operations is usually excluded from the marine hull policy by a clause in such policy known as the "Free of Capture and Seizure Clause" (commonly called the F. C. & S. Clause) which *excludes* from the marine policy all such risks including "all consequences of hostilities or warlike operations."

There may then be added to the marine policy a "war risk endorsement", or a separate policy issued, which insures all risks excluded from the marine policy by the F. C. & S. Clause.

In the present case, pursuant to the provisions of Clause 20 of Part II of the Requisition Time Charter, petitioner elected to assume all ordinary marine risks. It did not take out any marine hull policy.*

The war risk insurance called for by the *Worthington* charter was written by a combination of documents and provisions prescribed and promulgated by respondent; viz., (1) a war risks binder; (2) the W. S. A. standard form of marine hull policy containing an Adventures and Perils Clause, a Collision Clause, and an F. C. & S. Clause, to which was attached (3) a war risk endorsement by which the United States insured the risks excluded from the marine hull policy by the F. C. & S. Clause.

The War Risks Binder contained the following clauses:

> "'3. This binder shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration. * * *
>
> * * * * * * *
>
> Endorsement No. 1.
>
> '2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to this vessel accepted by the assured and any modifications or amendments thereto.'"

---

*The form of marine hull policy here involved was not issued as an actual policy of marine hull insurance. It was the "attached policy" referred to in the war risk endorsement. It was the form referred to in the War Risks Binder, and which provided the basis for the war risk insurance here involved. The Court of Appeals stated in the opinion that "Standard took out a normal marine hull policy which contained an F. C. & S. clause, excluding from its coverage war risks." *Opinion*, R. 101. That is not an accurate statement and there is no basis for it in the evidence, nor in the Twelfth Finding of Fact, R. 84, as suggested by Government counsel in brief in opposition to petition for writs of certiorari herein.

War Risks Binder, Eighth and Ninth Finding of Fact, R. 81-82; Exhibit 1-B, R. 32; Exhibit B in exhibit volume.

The form of standard marine hull and war risk policy referred to in said binder and charter, as prescribed by War Shipping Administration at the time of this collision, contained a *"Full collision—Sister-ship collision"* clause, relating to liability arising from collision and under certain conditions the costs of defense, as follows:

> *"Full collision—Sister-ship collision.* And it is further agreed that if the Vessel hereby insured shall come into collision with any other ship or vessel and the Owners or Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Assurers will pay the Owners or Charterers such proportion of such sum or sums so paid as the Assurers' subscription hereto bears to the value of the Vessel hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, the Assurers will also pay a like proportion of the costs which the Owners or Charterers shall thereby incur, or be compelled to pay; * * *"

Form of Policy, Ex. 1-(c), R. 71-72, in evidence, R. 32; *Tenth Finding of Fact,* R. 83.

Said marine hull policy form also contained an F. C. & S. Clause (in italics) which excluded from the

form of marine hull policy any claim for loss, damage or expense caused by or resulting from, among other things, "all consequences of hostilities or warlike operations." The provisions of the F. C. & S. Clause, material here, were as follows:

> *"F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *."*

Attached to the F. C. & S. Clause and printed in italics with it, was a paragraph which subordinated the F. C. & S. Clause to any war risk indorsement later added, as follows:

> *"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."*

Form of Policy, Government Ex. 1-(c), R. 71 in evidence, R. 32; *Tenth Finding of Fact*, R. 82.

The risks excluded from the form of marine hull policy by the F. C. & S. Clause were insured by respondent by means of a war risk endorsement attached to said marine hull policy form. Said war risk endorsement contained, among others, the following provisions:

> "War Risk Clauses.
>
> Endorsement to be attached to and to be made part of Policy No. .....
>
> It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the

F. C. & S. warranty contained therein but which are excluded by that warranty."

War Risk Clauses, Eleventh Finding of Fact, R. 83-84; Government Ex. 1-(c), R. 72, in evidence R. 32.

The full text of the form of marine policy (Form No. 7) with form of War Risks endorsement, Form No. 7A, will be found marked Exhibit C in the Exhibit Volume, being a photostat of the standard forms of marine hull policy and war risk endorsement published by War Shipping Administration in a volume entitled "Compilation of Standard Contract Forms of the War Shipping Administration," Washington, 1945, pp. 586-595.

It was part of the agreed findings of fact that said War Risks Binder and all said insurance provisions were in effect at the time of the collision; that petitioner duly performed all the terms and conditions of said charter and insurance contract on its part to be performed and did not carry any other insurance as to the *Worthington. Eighth to Twelfth Findings of Fact,* inclusive, R. 81-84.

By letter of December 7, 1945, petitioner notified respondent, through the Insurance Division of War Shipping Administration, that any liability on petitioner's part or on the part of the *Worthington* is covered by said war risks binder and insurance, and asked respondent's consent as war risk underwriter that the libel in No. 27 be defended for respondent's account. In the same letter petitioner informed respondent that petitioner would look to it for full indemnity as to any and all liability in the premises, and as to all costs of defense incurred by petitioner in defense of respondent's collision libel. *Letter,* Exhibit A, R. 76 in evidence R. 55; *Thirteenth Finding of Fact,* R. 84-85.

The Government's reply dated December 14, 1945 among other things, denied that the Government was concerned in the petitioner's claim; and stated in effect that any claim or suit by the United States as owners of the Ship *YMS-12*, in which the Division of Maritime Insurance might prove to be concerned, *would be waived. Letter*, Exhibit B, R. 77 in evidence R. 55; *Fourteenth Finding of Fact*, R. 85-86.

The waiver* referred to in that letter is the basis for dismissal by the District Court of respondent's collision libel in No. 27 (*Decree*, R. 95-96) in view of its adjudicated liability under the war risk insurance, thus, in effect, granting petitioner a full set-off and avoiding unnecessary circuity of action.

(d) *The issues*

The principal issues in these cases are therefore the same,—

(1) whether the collision at sea between the *Worthington* and the *YMS-12* actually engaged in the warlike operation of mine sweeping was a consequence of the *YMS-12's* warlike operation within the provisions of the war risk insurance of the *Worthington*, and

(2) whether such war risk insurance covered petitioner's collision liability as owner and operator of the *Worthington*

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* See Interdepartmental Waiver promulgated by War Shipping Administration in Legal Bulletin W. S. A. No. 23, Part II, dated January 14, 1943:

> "II. *Inter-Departmental Claims*
>
> Generally stated, it can be said that all types of maritime claims in favor of or against a Government department or agency, such as War Shipping Administration, Army, Navy, Lend-Lease Administration, etc., which claims are in turn for or against another United States Government department or agency, are to be waived and will not be asserted or pressed to final conclusion. * * *"

for the collision damages sustained by and with respect to the *YMS-12*.

No. 28 involves a further question of law as to whether said war risk insurance covered also the costs of defense incurred by petitioner in defending the collision action, No. 27.

Specification of Errors

The United States Court of Appeals for the Second Circuit erred—

1. In failing to hold that the collision was a consequence of the warlike operation of mine sweeping on which the Navy Minesweeper *YMS-12* was concededly engaged at the time of the collision.

2. In holding, although it is conceded that the *YMS-12* was engaged in the warlike operation of mine sweeping at the time of the collision, that the stipulated facts failed "to show that the loss was a consequence of hostilities." R. 112-113.

3. In refusing to follow the decisions of the House of Lords in *Board of Trade* v. *Hain Steamship Co. Ltd. (The Roanoke-The Trevanion)* [1929] A. C. 534 and *Attorney General* v. *Adelaide Steamship Co. Ltd. (The Warilda)*, [1923] A. C. 292, despite the admonition of this Court in *Queens Ins. Co. of America* v. *Globe & Rutgers Fire Ins. Co. (The Napoli)*, (1924) 263 U. S. 487 at page 493.

4. In holding that said admonition "at best had its basis entirely in business expediency, and should not go beyond that." and that "Here all demands of business expediency must be held to have ceased because the British underwriters in 1942 changed the form of their F. C. & S. clause and war risk clause * * *". R. 111.

5. In holding that the American authorities are contrary to the rule stated in the English decisions above cited.

6. In holding that the collision was *due to* the faulty navigation of the two vessels. R. 103.

7. In construing Article 5 of the Stipulation of Facts, Government Exhibit 1, R. 69, in evidence R. 32, *(Fifth Finding of Fact,* R. 80), as showing an agreement that *the cause* of the collision was failure on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship, R. 113.

8. In failing to hold that the stipulated negligence was only *contributory to* the collision.

9. In failing to accept the finding of the District Court, R. 90, that "the negligence found to exist was negligence 'under the circumstances' of the special and extraordinary conditions existing—conditions created by the warlike operation of mine sweeping."

10. In reversing, and failing to affirm, the decision and decree of the District Court which sustained petitioner's defense and dismissed the libel in No. 27, and allowed petitioners to recover in No. 28 the costs of defense incurred in No. 27. (R. 114.)

Summary of Argument.

I.

This collision occurred at sea between a merchant vessel and a United States Navy minesweeper actually engaged in the warlike operation of mine sweeping.

Under such circumstances the collision is a consequence of a warlike operation within the meaning of the phrase "all consequences of hostilities or warlike operations" as

found in the present war risk insurance, not withstanding that negligent navigation of both vessels contributed to the loss. *General Ins. Co. of America* v. *Link et al., (The Eastern Prince-U. S. S. Roustabout)*, (9 Cir. 1949) 173 F. 2d 955.

In *Queens Ins. Co. of America* v. *Globe and Rutgers Fire Ins. Co. (The Napoli)*, (1924) 263 U. S. 487 this Court issued an admonition that "there are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business".

The United States Court of Appeals for the Ninth Circuit, governed by the admonition of this Court, followed the English rule in *General Ins. Co. of America* v. *Link, et al. (The Eastern Prince-U. S. S. Roustabout)*, (9 Cir. 1949) *supra*.

The decisions of the House of Lords hold that a vessel moving through the water on a warlike operation is a moving instrument of war, and damage actively done by her while so engaged, to another vessel or to herself, in collision or stranding, is a consequence of her warlike operation. It makes no difference that negligence of those in charge of a vessel so engaged, or of both vessels in a collision involving a vessel so engaged, may have contributed to the loss. The war risk underwriters of either vessel cannot escape liability on the ground of such negligence. *Attorney-General* v. *Adelaide Steamship Co. Ltd. (The Warilda)*, [1923] A. C. 292; *Board of Trade* v. *Hain S. S. Co. Ltd. (The Roanoke-The Trevanion)*, [1929] A. C. 534; *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport (The Coxwold)*, [1942] A. C. 691; *Liverpool and London War Risks Assn. Ltd.* v. *Ocean Steamship Co. Ltd. (The Priam)*, [1948] A. C. 243, 255, 256, 259.

At the time of the decision below there were no American authorities contrary to the English decisions above

cited. The early American cases involved only insurance of "war risk". The term "war risk" was therein adjudicated to mean only "act of the public enemy or, at the utmost, the casualties of war". The decision of this Court in *The Napoli, supra,* while involving "consequences of hostilities or warlike operations," did not decide the present question because the Court found that neither vessel in the collision was engaged on a warlike operation. The Court of Appeals below recognized the limited effect of *The Napoli* decision. The District Court decision of *Meseck Towing Lines, Inc.* v. *Excess Ins. Co.* (EDNY, 1948) 77 F. Supp. 790, in a collision between a tugboat and a submarine chaser, was based on a finding of fact that the submarine chaser was not engaged in a warlike operation at the time of collision.

The case of *Libby, McNeil & Libby, etc.* v. *United States* (Ct. Cl. 1950) 87 F. Supp. 866, and other cases decided after the decision of the Court of Appeals below, have no greater weight than the decision now under appeal.

The Court of Appeals below refused to follow the admonition of this Court in *The Napoli, supra,* and likewise the English rule, apparently holding, although it is not explicitly clear, that negligence on the part of both vessels was the proximate cause of the collision, a theory expressly rejected in *The Warilda* and *The Roanoke-The Trevanion*, above cited, and likewise rejected in *General Ins. Co.* v. *Link, et al.,* (9 Cir. 1949) *supra.*

The expression "cause nearest to the loss" as used in *Queen Ins. Co.* v. *Globe and Rutgers Fire Ins. Co. (The Napoli), supra,* is one of many forms of expression used by the Courts to describe the dominant and effective cause of the loss not necessarily the cause nearest as to place or time. *Insurance Co.* v. *Boon,* (1877) 95 U. S. 117; *Lamasa Fruit, etc. Co.* v. *Universal Ins. Co. (The Smaragd),* (1938) 302 U. S. 556, 562; *British and Foreign Steamship Co. Ltd.*

v. *The King (The St. Oswald-The Suffran)*, (1918) 2 K. B. 879, 890-1; *Leyland Shipping Co.* v. *Norwich Union Fire Ins. Society (The Ikaria)*, [1918] A. C. 350; *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport (The Coxwold)*, [1942] A. C. 691, 705-707.

Insurance against a specified peril is not affected by the cooperation or contribution of another cause or of negligence contributory to the loss. *The Patapsco Insurance Co.* v. *Coulter*, (1830) 3 Pet. 222, 237; *Columbia Insurance Co.* v. *Lawrence*, (1836) 10 Pet. 509; *Waters* v. *The Merchants' Louisville Ins. Co.*, (1837) 11 Pet. 218, 221; *General Ins. Co.* v. *Sherwood*, (1852) 14 How. 361, 365; *Insurance Company* v. *Transportation Co.*, (1870) 12 Wall. 194; *Orient Insurance Co.* v. *Adams*, (1887) 123 U. S. 67, 72-73.

The rule is the same in England. *Board of Trade* v. *Hain S.S. Co., Ltd.*, [1929] A. C. 534, 539, 544; *Attorney General* v. *Adelaide S.S. Co. Ltd.*, [1923] A. C. 292, 298, 300, 307-308; *Yorkshire Dale S.S. Co. Ltd.*, v. *Minister of War Transport*, [1942] A. C. 691, 711; *Trinder, Anderson & Co.* v. *Thames and Mersey* Mar. Ins. etc. (C. A.) [1898] 2 Q. B. 114, 123-24. See also *Arnould on Marine Insurance* (13th Ed.) Vol. II, Secs. 798-799, pages 718-720.

II.

The Court of Appeals below did not decide the question of war risk insurance of petitioner's collision liability because it held in effect that the war risk insurance did not come into operation. Nevertheless it reversed the decision and decree of the District Court in favor of petitioner on this question. R. 113.

The present war risk endorsement, prescribed and issued by the Government, respondent herein, is in form en-

tirely different from that found in *Adelaide Steamship Co. Ltd.* v. *The Crown* [1926] A. C. 172, the second *Warilda.**

The second paragraph of the F. C. & S. Clause of the marine hull policy form is in effect a subordination clause and was rightly so described by the District Court. R. 94. It subjected the F. C. & S. Clause to amendment by virtue of any "inconsistent" terms contained in a war risk endorsement to be later added to the policy form. Thus the F. C. & S. Clause, must be read as amended by the terms of the war risk endorsement, and as so amended, it excluded from the marine hull policy form any claim under the Collision Clause arising from any casualty which is a "consequence of hostilities or warlike operations", along with any other claim arising from such a casualty.

The present war risk endorsement expressly refers to and insures the risks, covered by the Collision Clause, which are excluded from the marine hull policy by the amended F. C. & S. Clause.

Petitioner's collision liability was therefor excluded from the marine hull policy form by the F. C. & S. Clause as so amended, and was taken over and insured by the war risk endorsement.

There were not any such provisions in the charter clause which provided the war risk insurance of the second *Warilda.* It was apparently included in the present war risk insurance in full light of the second *Warilda* and to avoid the effect of that decision. It thus marks a sharp distinction between the second *Warilda* and the present case.

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* That case is the second reported decision in which House of Lords dealt with the collision between *The Warilda* and *The Petingaudet*, and is commonly known as the second *Warilda*. For convenience it will be so referred to in this brief.

III.

The remaining question is as to petitioner's right to indemnity in No. 28 with respect to the costs of defense of respondent's collision libel in No. 27. The same provisions of the war risk insurance, prescribed and issued by respondent, which insured petitioner as to collision liability also insured petitioner as to the costs of defense of the collision libel in No. 27. Due notice was given by petitioner to respondent if any notice was necessary.

FIRST POINT.

THE COLLISION WAS A CONSEQUENCE OF THE WARLIKE OPERATION OF MINE SWEEPING IN WHICH THE *YMS-12* WAS THEN ENGAGED.

(a) *The admonition of this Court in The Napoli*

In *Queen Ins. Co. of America* v. *Globe and Rutgers Fire Ins. Co. (The Napoli)*, (1924) 263 U. S. 487 this Court dealt with a wartime collision between the *Napoli* and the *Lamington*.

The question was whether the damages to *The Napoli's* cargo were covered by war risk insurance which was treated as equivalent to insurance of "all consequences of hostilities or warlike operations."

It had already been held in England that sailing without lights and sailing in convoy, while sometimes described as "warlike precautions" (*The Warilda* [1923], A. C. 292, 300), did not alone constitute a "warlike operation" within the meaning of that term in policies of insurance. As it was said in *The Matiana* [1921], 1 A. C. 99, at page 109, "the warships which escort her convoy are engaged in a warlike operation but the merchant vessels in the convoy

are engaged in the peacelike operation of conveying merchandise by sea. The sheep are not the shepherd; and are not engaged in the operation of shepherding."

In *The Napoli,* neither vessel was carrying sufficient warlike cargo to give her voyage the character of a warlike operation. Following the English authorities, this Court held that neither the *Napoli* nor the *Lamington* were engaged on a warlike operation. Mr. Justice Holmes, at p. 493 of that decision, stated the principle of conformity to the marine insurance laws of England, as follows:*

> " * * * There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, * * * "

The Court of Appeals below, faced with the admonition of this Court, and finding as shall hereafter appear, that the English authorities were contrary to its own preconceptions, dismissed the *Napoli* admonition as a "dictum" of Mr. Justice Holmes (R. 110), and said that "such a rule at best had its basis entirely in business expediency, and should not go beyond that * * * ". R. 111. Following up the latter remark, the Court below said that all demands of the business expediency must be held to have ceased because the British underwriters in 1942 changed the form of their F. C. & S. clause and war risk clause, and concluded "Thus it is no longer necessary to conform to the supposed

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* See also *The Eliza Lines,* (1905) 199 U. S. 119, 128. That principle was later mentioned by this Court in *Aetna Ins. Co.* v. *United Fruit Co.,* (1938) 304 U. S. 430. It has also been recognized by the Circuit Courts of Appeals in *N. Y. and Oriental S. S. Co.* v. *Federal Ins. Co.,* (2 Cir. 1930) 37 F. 2d 461, 463; *The Galileo* (2 Cir. 1931) 54 F. 2d 913, 915; *Aetna Ins. Co.* v. *Houston Oil Transport Co.,* (5 Cir. 1931) 49 F. 2d 121, 124; *Aetna Ins. Co.* v. *United Fruit Co.,* (2 Cir. 1937) 93 F. 2d 576, 580; and in the District Court decisions of *Mellon* v. *Federal Ins. Co.,* (SDNY 1926) 14 F. 2d 997, 1004; *The Shodack,* (SDNY 1936) 16 F. Supp., 218, 219; *Stofey* v. *U. S.,* (MDPa., 1949) 87 F. Supp. 81, 83.

British rule in order that the same language shall mean the same thing both in America and England." R. 111.

The *Napoli* admonition should not be so lightly dismissed. This Court in *The Napoli* followed the English decisions even to the extent of holding that sailing in a wartime convoy in darkness and without lights did not constitute a warlike operation. Mr. Justice Holmes cited and followed the decisions of the House of Lords in *British Steamship Co. Ltd.*, v. *The King (The Petersham)*, [1921] 1 A. C. 99 and *Green* v. *British India Steam Navigation Co. Ltd. (The Matiana)*, [1921] 1 A. C. 104. *The Petersham* was a collision. *The Matiana* was a stranding. While there is much to be said for the point that the sailing in wartime of two convoys in utter darkness with lights doused were of the very nature and substance of warlike operation, and that the meeting of the two convoys head on and the resulting collision between *The Napoli* and *The Lamington* were consequences of such warlike operation, this Court nevertheless accepted the English rule and applied the authorities mentioned. There was nothing of "business expediency" in the decision of this Court in *The Napoli*. It was a rule of law, and should have been so accepted by the Court below as it was in *General Ins. Co.* v. *Link, et al.* (*The Eastern Prince-USS Roustabout*), (9 Cir. 1949) 173 F. 2d 955.

In order to carry through its erroneous theory, the Court below attempted to avoid the *Napoli* admonition because the English authorities cited to the Court call for an unavoidable conclusion that the present collision was a consequence of the warlike operation of the *YMS-12*. The basis assigned by the Court below for avoidance of the *Napoli* admonition is palpably unsound. The admonition was not based on "business expediency", and the fact that British underwriters have seen fit to broaden their cover

beyond the limits fixed by the English decisions, and thus increase their premium revenues, has nothing to do with the legal construction of the insurance contract in effect at the time of this collision.

(b) *The decision of the Ninth Circuit Court of Appeals in The Eastern Prince-USS Roustabout.*

Before the decision of the Court of Appeals below, there was only one decision in the American courts on the question whether, under the form of insurance here found, a collision between a merchant vessel and a vessel engaged on a warlike operation was a consequence of that warlike operation. That decision was *General Ins. Co. of America* v. *Link, et al. (The Eastern Prince-USS Roustabout)*, (9 Cir. 1949) 173 F. 2d 955.

In that case a collision occurred in May, 1942 between the *Eastern Prince*, a merchant vessel, and *USS Roustabout*, a United States Navy tanker in charge of Navy personnel, the latter carrying miscellaneous military cargo from a Navy Section Base in Sitka, Alaska to a Naval Station at Seattle by way of the Inside Passage. Both vessels were held at fault, the former for obscuring her running lights by deck cargo, the latter for navigating on the wrong side of the inside passage. The suit was for damage sustained by the *Eastern Prince*, and was based on war risk insurance provisions similar to those found here. Recovery was allowed.

In the absence of direct decision by this Court on the question presented, the Court followed the admonition of this Court in *The Napoli, supra*, and on authority of the decisions of the House of Lords in *Board of Trade* v. *Hain S. S. Co. Ltd. (The Roanoke-The Trevanion)*, [1929] A. C. 534 and *Attorney-General* v. *Adelaide Steamship Co. Ltd. (The Warilda)*, [1923] A. C. 292, held that the collision

was a consequence of the warlike operation of *USS Roustabout*, the Navy tanker, notwithstanding that both vessels were guilty of negligent navigation. That decision is squarely in point.

The United States Court of Appeals for the Second Circuit refused to follow the decision in the Ninth Circuit in *The Eastern Prince-USS Roustabout*, *supra* and, in disregard of the admonition of this Court in *The Napoli*, *supra*, the English authorities on which it was based.

(c) *The English Authorities*

In *Attorney-General* v. *Adelaide Steamship Co. Ltd.*, *(The Warilda)* [1923] A. C. 292, a collision occurred between *The Warilda*, a hospital ship evacuating wounded troops from France and thus held to be engaged on a warlike operation, and *The Petingaudet*, a merchant ship which was displaying dimmed side lights. The vessels sighted each other at a distance of about half a mile [C. A. 1923] 1 K. B. 59, 62. The vessels were found to have met in a crossing situation with *The Warilda* the burdened vessel. She failed to keep out of the way and was held guilty of negligent navigation. The House of Lords held that the dominant and effective cause of the collision was the warlike operation of *The Warilda*. The House of Lords said, [1923] A. C. at page 298 (italics ours):

> "The second point was put on behalf of the appellant in this way. It was said that the warlike operation of the *Warilda* was not the proximate cause of the collision, that the negligence of her master was a new factor intervening between the warlike operation and the collision, and that the collision was a consequence of that negligence and not of the warlike operation. The Court of Appeal unanimously rejected this argument, and held the

Crown responsible. My Lords, I agree with the view taken by the Court of Appeal. By the terms of the charterparty, the Crown is liable for 'all consequences' of hostilities or warlike operations, nothing being said about their being skilfully or unskilfully conducted. The navigation of the *Warilda* in those waters at full speed without lights was clearly a warlike operation, which in itself involved peril to other ships. The operation may have been negligently conducted so far as the safety of other vessels was concerned, but the same may be said of many other warlike operations. *The negligence of the master may have contributed to the loss; but its dominant and effective cause was the operation in which the vessel was engaged, and the liability therefore attaches.* * * *"*

and at page 300;

"* * * And, in short, it appears to me that when a ship requisitioned by the naval authorities and actually engaged in what I have explained to be a warlike operation comes into collision with another vessel under, of course, the exceptional conditions of speed, with lights doused and other such warlike precautions, the category of war risk cannot be changed into the category of sea risk by reason of the negligence of those engaged in conducting those operations. The conduct may have been faulty, but it was a warlike operation although faultily conducted. Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk. *Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations.*"

In *The Roanoke-The Trevanion, Board of Trade* v. *Main S. S. Co. Ltd.*, [1929] A. C. 534, the House of Lords followed the same principle in a collision, *after the 1918 Armistice*, between the British merchant ship *Trevanion* and the United States Navy Mine Planter *Roanoke*, carrying a quantity of mines.

Both vessels were found to be guilty of negligent navigation by reason of negligent lookout. *The Trevanion*, as the burdened vessel in a crossing situation, failed to give way, and the *Roanoke* failed to keep her course. It was held that the collision was a consequence of the warlike operation of the *Roanoke*, notwithstanding negligence of both vessels.*

In *The Coxwold* (*Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport*), [1942] A. C. 691, the House of Lords applied the same principles to a case of stranding of a vessel engaged on a warlike operation. In that case Lord Porter set down a summary of English law on the whole subject, of which Items 8 and 9 apply directly to the case at bar. The Court below treated that decision as holding that "* * * the dominant and effective cause which set the vessel on the rocks was a deviation of course it had made under naval orders to avoid submarine attack. * * *" R. 107. The change of course to avoid what was thought to be an enemy submarine was stated in the opinions of the Lord Chancellor

* The result was the same in collisions between merchantmen and vessels engaged on warlike operations where there was no fault on the part of either vessel. The collision is the consequence of the warlike operation. *British and Foreign Steamship Company, Ltd.* v. *The King* (*St. Oswald-Suffren*), (1918) 2 K. B. 879; *Attorney-General* v. *Ard Coasters, Ltd.* (*Ardgantock-Tartar*) (1921) 2 A. C. 141; *Liverpool & London War Risks Insurance Association Ltd* v. *Marine Underwriters of S.S. Richard de Larrinaga* (*Richard de Larrinaga-Devonshire*), (1921) 2 A. C. 141; *Charente Steamship Company* v. *Director of Transports*, (*Instructor-America*), (1922) 10 Ll. L. L. R. 514; *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*, (*Geelong-Bonvilston*), (1923) A. C. 191.

and Lord MacMillan, but the other judges paid little attention to it. The dominant and effective cause of the stranding was held by the majority to be the warlike operation of the vessel, being engaged on a voyage from a British war base to a war base in Norway carrying munitions of war.

A variation is found in a case where the vessel engaged on a warlike operation is not *active* in the collision. In *Clan Line Steamers Ltd.* v. *Board of Trade (The Clan Matheson-The Western Front)*, [1929] A. C. 514 the *Clan Matheson* and the *Western Front* were steaming in adjacent columns in a convoy. The *Clan Matheson* was a merchant ship carrying mostly civilian cargo. The cargo of the *Western Front* was entirely made up of munitions of war, being carried from the United States to a war base in France. At night, in a rough sea, the convoy sailing without lights but with good visibility in moonlight and every vessel in the convoy easily seen, the steering gear of the *Clan Matheson* went out of order and the vessel sheered to left across the bows of the *Western Front*. The *Western Front* struck the *Clan Matheson* and the latter sank within two hours. It was contended that the case was governed, among other authorities, by *The Warilda, supra,* but the Court held that the collision was due solely to the breakdown of the steering gear of the *Clan Matheson,* a merchant vessel; that from the moment the breakdown occurred, the collision was inevitable, and that the collision was the consequence of that breakdown alone. At [1929] A. C. pp. 527-8, Viscount Sumner wrote as follows:

> "* * * It appears to me that on the facts found the collision had become inevitable for a material, if not a measurable, time, before the impact occurred, and, if so, the character of the other vessel, as well as the direction of her course and of the blow, fail to become material. The *Clan Matheson* had become irretriev-

ably a loss by a marine peril before the collision happened, and the character of the object with which she collided was a pure incident. If it had not been the *Western Front* it would have been some other ship."

It is thus clear that the *Western Front* engaged on a warlike operation no more contributed to the sinking of the *Clan Matheson* than if she had been a rock or any other obstacle in the way of the sheer of the *Clan Matheson*. The *Western Front* was not an active agent in the collision. This distinction was sharply pointed up later in *The Priam*, [1948] A. C. 243.

In *The Priam, Ocean Steamship Co. Ltd.* v. *Liverpool & London War Risk Ins. Assn. Ltd.*, [1948] A. C. 243, the House of Lords dealt with a case in which there was neither a collision nor a stranding but one in which there was damage to cargo by seawater during heavy weather, the vessel being engaged on a voyage which constituted a warlike operation. Some of the damage was attributable to armament installed on and military equipment carried on deck, and some of the damage resulted from the carriage of commercial cargo on deck. The House of Lords distinguished between the two kinds of damage, holding the former due to war risk and the latter due to marine risk.

The Priam was a refinement of the general doctrine in its application to a set of facts not theretofore considered, viz., damage to cargo by heavy weather. Indeed, the situation presented in *The Priam* was forecast by Lord Wright in his opinion in *The Coxwold* [1942] A. C. at pp. 712-713. In *The Priam* the House of Lords [1948] A. C. at pages 253 and 259 recognized the rule stated in *The Warilda, The Roanoke-The Trevanion* and *The Coxwold*, viz., cases of collision and stranding of vessels engaged on a warlike

operation. Lord Wright said [1948] A. C. page 257: (italics ours)

> "On the main issue, however, it seems to me that *there is a real difference of substance in this context between the ship striking a rock or colliding* and being struck by a sea. It is true that it is while she is pursuing the contemplated warlike operation that the sea strikes her and that her striking the rock or colliding is as little purposed as her being struck by a heavy sea. But in the former case she is an *active agent* quoad striking the ship or rock, in the latter she is merely passive. I think that this is a sufficient distinction on the authorities for this purpose. * * *"

And at page 259: (italics ours)

> "Outside of the particular concept of the 'warlike operation' or particular war risks the sea peril remains and must still be held to be the operative peril for which the marine underwriters continue to be liable, *except in the case of collision, stranding or the like, due to the ship, a 'warlike operation' ship, being actively directed into the obstacle on her warlike course:* for other cases a purely marine loss due to heavy weather must still be held to be the liability of the marine underwriters. * * *"

And Lord Porter said at page 268 (italics ours):

> "* * * As Lord Wright pointed out in *The Coxwold* [1942] A. C. 691, 713: 'the basis of the decisions seems to be that the casualty can be traced to *definite action* on the part of those on board the warship or quasi-warship . . . in directing the course of the vessel to carry out the warlike operation.' That direction may take her into collision with another vessel or on to a rock, but incidents may occur in the course of the voyages without being caused

by such definite action on the part of those directing it. In the case of stranding or collision the progress of the ship brings her on to the rock or into the other vessel. The rock does not move; it is static. If the other vessel runs into her and *it is that vessel's action which causes the injury, it is the progress of that ship and not that of the damaged vessel which causes the injury,* and whether that injury is a war or marine loss depends upon whether the other ship, not the damaged vessel, is engaged upon a warlike operation or upon an ordinary mercantile adventure. * * *"

The above quotations from *The Priam* reflect the true basis for the decision in *The Clan Matheson-The Western Front, supra, viz.,* that the *Clan Matheson,* the merchant vessel, sheered across the bows of the *Western Front.* Thus the entire causation was on the part of the merchant vessel. In the case at bar it cannot be said that either vessel ran into the other. The collision was due to negligent navigation of both "under the circumstances." *Fifth Finding of Fact,* R. 80. See *The Roanoke-The Trevanion,* [1929] A. C. 534.

The principle is therefore clear, under the English cases above cited, that when a vessel is in motion through the water on a warlike operation, she is a moving instrument of war, and damage actively done by her while so engaged, to another vessel, or to herself, in collision or stranding is a consequence of her warlike operation. It makes no difference that negligence of those in charge of a vessel so engaged, or of both vessels in a collision involving a vessel so engaged, may have contributed to the loss. The war risk underwriter of either vessel cannot escape liability on the ground of such negligence.

These are the authorities which apply to the case at bar under the admonition of this Court in *The Napoli.*

The Court below attempted to classify a number of English decisions on varying facts relating to the distinction between marine risk and war risk for insurance purposes, R. 105-108. Such a study might be profitable if one were prepared to accept the inevitable result. But the analysis made by the Court below lost all point when it came to a consideration of the only two decisions of the House of Lords which were on facts similar to the present case. Those decisions are *Attorney-General* v. *Adelaide Steamship Co. Ltd. (The Warilda)* [1923] A. C. 292 and *Board of Trade* v. *Hain S. S. Co. Ltd. (The Roanoke-The Trevanion)* [1929] A. C. 534, on which the *Eastern Prince-USS Roustabout* decision was based. Both were collision cases with fault on the part of the vessel engaged in a warlike operation.

When the Court below, at the end of its analysis of the English authorities finally reached those two decisions directly in point here, it said:

> "If *The Warilda* and *Roanoke-Trevanion* cases really carry British law thus far, we are necessarily compelled to refuse to follow them * * *" R. 108.

It is quite apparent that the extended analysis of the English authorities was undertaken by the Court below in order to rationalize the causation theory on which it based its decision. It even attached considerable weight to the tentative doubts of Lord Wrenbury, as expressed in *The Petersham* and *The Matiana*, R. 112. That dictum of Lord Wrenbury was later ignored by the House of Lords in *The Warilda* and *The Roanoke-The Trevanion*, above cited. Indeed Lord Wrenbury seemed to have changed his mind because he was a member of the unanimous Court in the *Warilda* decision.

(d) *The Rule of Proximate Cause*

The Court of Appeals below recognized that the English courts are as much concerned with proximate cause as

American courts, R. 112, and that the rules set forth in the House of Lords are probably not as much at variance with our rules as has been claimed.

The insurance rule of *causa proxima*, or as it was put in *The Napoli*, "the cause nearest to the loss", prevails both in England and in this country. The phrase "the cause nearest to the loss" was one of many forms of expression used by judges to describe the same thing. See *British & Foreign Steamship Co. Ltd.* v. *The King (St. Oswald-Suffren)*, (1918) 2 K. B. 879 at pages 890-891, where Lord Justice Duke collected the various expressions in order to clarify the essential meaning. But it does not follow that the cause nearest to the loss is the one nearest as to place, or nearest in point of time. Compare the decision of this Court by Mr. Justice Holmes in the following year in *Standard Oil Company of New Jersey* v. *United States (The Llama)*, (1925) 267 U. S. 76, where a stranding was held to be due to war risk under Government policies covering "takings at sea", it being found that at the time of loss the vessel had passed out of her owner's control by seizure within the policy and was under the paramount control and possession of the British Cruiser *Virginia*. This Court did not inquire into whether or not the stranding was due to negligence. The *Virginia's* boarding party went on board the *Llama* on October 29, 1915. She was on her way into Kirkwall when she was lost on October 31, 1915. It was held that the loss was due to the seizure as a war risk, not to the stranding as a marine risk.

See also *Insurance Company* v. *Boon* (1877), 95 U. S. 117 at page 133:

> "The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. * * *"

In *Lanasa Fruit, etc. Co.* v. *Universal Insurance Co. (Smaragd)*, (1938) 302 U. S. 556, this Court showed by their treatment of causation that "proximate cause" in insurance cases must be understood to mean the "dominant and effective cause" or "the real efficient cause", rather than the event nearest to the loss in point of time or place. In the *Smaragd* case the question was whether damage to a cargo of bananas which became overripe and rotted during a delay resulting from stranding, was within the insurance against peril of the sea. At page 562 the Court said (italics ours):

> "The sole question is whether in these circumstances the stranding should be regarded as the proximate cause of the loss. Respondent contends that decay or inherent vice was the proximate cause. It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, *the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result. Insurance Company* v. *Boon*, 95 U. S. 117, 130; *Arnould on Insurance*, 11th ed., Sec. 783."

In the *Lanasa* case Mr. Chief Justice Hughes thereupon examined *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society, (The Ikaria)*, [1918] A. C. 350 and accepted the principles of causation there stated. This Court reversed the Circuit Court of Appeals for the Fourth Circuit which had done in effect what was done by the Court of Appeals below, i.e., it applied literally the words of the *Napoli* case, "the cause nearest to the loss." The Chief Justice concluded at page 572 (italics ours):

> "* * * The instant case is one of stranding, a sea peril insured against, and we think that the well-settled doctrine of proximate cause, *meaning the real*

> *efficient cause of the loss,* requires the conclusion that, upon the assumptions of fact we stated at the outset, the loss of the cargo was within the general coverage clause of the policy."

The tort causation theory that "negligence is the intervening cause" advanced by the Government, and apparently accepted by the Court of Appeals below is not applicable here. The same notion is found in the subsequent decision in *Libby, McNeil & Libby etc.* v. *United States (The David W. Branch),* (Ct. Cl. 1950) 87 F. Supp. 866. That theory was put forward, and flatly rejected, in *The Warilda,* twenty-seven years ago.

The error lies in failure to perceive that this is not a tort question of liability for negligence. It is a matter of insurance of a specified risk.

In *The Warilda,* Lord Sumner said [1923] A. C. at pages 305-6:

> "• • • I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions, when the question is how to attribute blame to persons, but is only evidentiary in insurance actions, where the question is whether the event has happened which entitles the assured to be indemnified."

In *The Warilda,* Lord Shaw of Dunfermline said [1923] A. C. at page 300:

> "• • • Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk. Once the category

of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations."

The citation of Corpus Juris Secundum at R. 110 shows the misconception of the whole point. It begs the question to cite the well established rule that war risk insurance does not cover *marine risks aggravated by war*, but which nevertheless remain marine. Here it is conceded that the *YMS-12 was engaged on the warlike operation of mine sweeping*, and the issue is whether the collision was a consequence of that warlike operation even though contributed to by negligence.

It is settled in this country that insurance against a specified peril is not affected by the cooperation or contribution of another cause, or of negligence contributory to the loss. *The Patapsco Insurance Co.* v. *Coulter*, (1830) 3 Pet. 222, 237; *Columbia Insurance Co.* v. *Lawrence*, (1836) 10 Pet. 509; *Waters* v. *The Merchants' Louisville Ins. Co.*, (1837) 11 Pet. 218, 221; *General Ins. Co.* v. *Sherwood*, (1852) 14 How. 361, 365; *Insurance Company* v. *Transportation Co.*, (1870) 12 Wall. 194; *Orient Insurance Co.* v. *Adams*, (1887) 123 U. S. 67, 72-73. See also *Arnould on Marine Insurance* (13th Ed.) Vol. II, Secs. 798-799, pages 718-720.

The rule is the same in England. *Board of Trade* v. *Hain S. S. Co. Ltd.* [1929] A. C. 534, 539, 544; *Attorney General* v. *Adelaide S. S. Co. Ltd.*, [1923] A. C. 292, 298, 300, 307-308; *Yorkshire Dale S. S. Co. Ltd.* v. *Minister of War Transport*, [1942] A. C. 691, 711; *Trinder, Anderson & Co.* v. *Thames and Mersey Mar. Ins. Co. etc.* (C. A.) [1898] 2 Q. B. 114, 123-124.

(e) *The American Decisions*

The decision of this Court in *Queen Ins. Co. of America* v. *Globe & Rutgers Fire Ins. Co. (The Napoli)*, (1924) 263 U. S. 487, was an important decision on the general subject, but it did not decide the question here involved. While the war risk insurance in that case contained provisions treated as equivalent to "all consequences of hostilities or warlike operations" neither vessel in that collision was found to have been engaged on a warlike operation. The decision was, in effect, that the collision between the *Napoli* and the *Lamington* was due to marine risk, not because it was due to negligence but because neither of the merchant vessels involved were engaged on a warlike operation. The Court below recognized that point. R. 105.

The point of negligence received considerable attention in the District Court and in the Circuit Court of Appeals for the Second Circuit; but it was passed over in this Court. Mr. Justice Holmes said:

> "* * * As our judgment is based on broader grounds, we do not describe the movements bearing upon the nice question whether the navigation of the *Napoli* or the *Lamington* was in fault."

There is not any conflict between the English decisions above discussed and the recent American decisions in the lower Courts.* None of those American cases mentioned in the decision below, R. 105, 109, 110, involved a collision in which one of the vessels was engaged in a warlike operation; and in the only stranding case cited, *Standard Oil*

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* *Reinold* v. *United States*, (2 Cir. 1948) 167 F. 2d 556, Cer. den. 335 U. S. 824; *Crist* v. *United States War Shipping Administration*, (3 Cir. 1947) 163 F 2d 145, Cer. den. 332 U. S. 852; *Dennehy* v. *United States*, (SDNY 1926) 15 F. 2d 196; *Standard Oil Company of New Jersey* v. *St. Paul Fire & Marine Ins. Co.*, (SDNY 1945) 59 F. Supp. 470; *Nordling* v. *Gibbon*, (SDNY 1945) 62 F. Supp. 932.

Company of New Jersey v. *St. Paul Fire & Marine Ins. Co.*, (SDNY, 1945) 59 F. Supp. 470, the vessel was on a commercial voyage.

The main point of the Government's case in the Courts below, and of the opinion of the Court of Appeals below, is that the English rule "would conflict hopelessly with a long line of American decisions", R. 108. That line of decisions as cited in the opinion, R. 109 begins with *Morgan* v. *United States*, (1871) 14 Wall. 531, and ends with *New Orleans-Belize, Royal Mail and Central American Steamship Co. Ltd.* v. *United States*, (1915) 239 U. S. 202, R. 109.

In setting up those cases as an obstacle to the application of the English rule, the Court below refused to recognize the exact nature of the war risk insurance involved in those cases, although it was fully discussed in brief and argument. R. 104 footnote.

The Civil War charters and later Government charters involved in those cases, with one exception immaterial here, provided only that the Government assumed the "war risk". The exception was the charter in *Leary* v. *United States*, (1877) 81 U. S. 607, in which the Government assumed "extraordinary marine risk". In all those cases the loss was held due to marine risk, and in *Leary* v. *United States* the loss was held not due to extraordinary marine risk.

The term "war risk" used in those charter provisions had the limited meaning of *acts of the public enemy or the casualties of war*. As none of those cases involved any act of the public enemy nor any casualty of war the Government was absolved from liability because it had assumed only "war risk".

The meaning of the term "war risk" was laid down in the decision of the Court of Claims in *Morgan* v. *United States*, (1869) 5 Ct. Cl. 182. There the vessel, carrying

troops and military stores, was ordered by military authority to sail from port, against the judgment of her master because of low water on the bar. She was damaged by striking the bar. At pp. 189-190, the Court said: (italics ours)

> "1st. We are to inquire whether the damage to this vessel was the result of a 'war risk' assumed in the charter-party by the United States. The term 'war risk' is an unusual one. I do not find it in the works on insurance or adjudged cases. In the case of *Bogert* v. *The United States*, (2 C. Cls. R., 159) this court held that the terms in a policy in which the United States were the insurers could not be extended beyond the 'acts of the public enemy' or 'the casualties of war'; and that by its use the United States did not insure against their own acts. In that case the vessel was in the service under a valued charter-party, and containing the accruing clauses, with the right to purchase at the specified valuation. During the period of the vessel's service, to guard against the approach, or defeat the operations of the enemy, General Butler caused the vessel to be sunk in the James River, and it was held that this was not embraced within the meaning of a war risk, as used in the charter-party; that such an undertaking by the government is not an insurance against its own acts, although it destroyed the vessel for a war purpose. *To bring it within such a war risk as is assumed in this contract, the damage must have resulted directly, or proximately at least, from some act or operations of the public enemy.* Nothing of the kind exists here, and no obligation rests upon the United States growing out of that clause in the charter-party."

See also *Bogert* v. *The United States*, (1866) 2 Ct. Cl. 159, where the vessel was deliberately sunk in the James

River by General Butler's orders as noted in *Morgan* v. *United States* above quoted. The loss was not due to an act of the public enemy, nor was it found to be a "casualty of war". The Court said at p. 163 (italics ours):

> "* * * I do not find that this general term 'war risk' has ever been employed in a policy of insurance, or, if so employed, that it has ever received a judicial interpretation. As employed in this contract, *we think that it cannot be extended so as to mean more than 'acts of the public enemy'; or, at the utmost, the casualties of war;* and we think that it was never intended that the government should be placed on the same footing with the public enemy, or become an insurer against its own acts."

Compare *Baker* v. *United States,* (1867) 3 Ct. Cl. 76, where the vessel was stranded and lost by capture because the enemy gun fire of a Confederate shore battery shot away her anchor chain. The resulting stranding and loss, in sharp distinction to the other Civil War decisions cited by the Court below, was held due to "war risk".

Thus the limits of the term "war risk" as found in those charters were clearly established. The losses in the *Morgan* and *Bogert* cases which clearly would be covered by the present war risk insurance as "consequences of hostilities or warlike operations" were held not covered by the narrow term "war risk" because there was no direct act of the public enemy and no direct casualty of war. Indeed, this Court on appeal in *Morgan* v. *The United States* (1871) 14 Wall. 531 observed that in obedience to the rule of proximate cause, it could not "proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel". Under the present insurance clause this Court would have made such an inquiry because the vessel, carrying troops

and munitions, was forced to sail against the judgment of her own Master and under direct compulsion of the orders of the military authority.

The meaning and scope of the term "war risk" as found in the early American cases is thus altogether clear. The later provision "consequences of hostilities or warlike operations" was not then, as it is now only by virtue of the present form of F. C. & S. Clause, and by statutory definition, *infra*, page 40, included among the risks covered by war risk insurance. Its history shows that it was devised to provide insurance for losses *in the nature of marine risk, but which are consequences of war though not directly due to enemy acts.*

In the footnote at R. 104, the Court of Appeals below stated that—

> "* * * the parties here showed a different view in their twenty-two clauses defining a war risk—insurance for this being the form of insurance required of the Government under its charter obligation—and demonstrating that 'consequence of hostilities' was only one component of many, of war risk; and we see nothing in the earlier cases or here to indicate that this conception is other than the natural and usually understood one."

The "twenty-two clauses" referred to are apparently the categories of the F. C. & S. Clause, which appears in full in the Tenth Finding of Fact. R. 82. It is immaterial whether or not the count of the categories is correct. The point is that the Court of Appeals below said that an F. C. & S. clause which defines various categories of risk to be excluded from a form of marine hull policy promulgated by the Government in 1942, defines the meaning of the term "war risk" as used in the Government charters in the Civil

War. Even if that proposition were not dubious on its face, it is deprived of all substance by the definition assigned to that term by the Court of Claims in *Morgan* v. *United States*, (1869) 5 Ct. Cl. 182, 189-190, Affirmed (1871) 14 Wall. 531, and *Bogert* v. *United States* (1866) 2 Ct. Cl. 159.

When the Court of Appeals below said, in its footnote on R. 104, that it saw nothing in the earlier cases to indicate that "this conception is other than the natural and usually understood one", it disregarded the plain interpretation and limitation of the meaning of the term "war risk" in the early cases, as stated by the Courts which decided those cases. It also ignored the history of the development of the present phrase "consequences of hostilities or warlike operations" which is now specially provided in what is commonly called "war risk insurance."

The history of the development of the phrase "all consequences of hostilities or warlike operations" was described by Lord Atkin in *Britain S. S. Co. Ltd.* v. *The King (The Petersham)*, [1919] 2 K.B. at pp. 692-693. Its development apparently began with the term "consequences of hostilities" as found in *Ionides* v. *The Universal Marine Ins. Co.*, (1863) 14 C. B. (N. S.) 259. The provision was later broadened in 1883 to include "warlike operation". See also *Arnould on Marine Insurance*, 13th Edition, Volume I, Sec. 10, pp. 14-21, and Volume II, Secs. 905a-905i, pp. 822-835. It appears that it was not until 1898 that Lloyds published an F. C. & S. clause containing the present provision. However, not all war risk insurance written thereafter contained it. Compare *Muller* v. *Globe and Rutgers Fire Ins. Co. (The Canadia)*, (2 Cir. 1917) 246 Fed. 759 with *Standard Oil Company of New Jersey* v. *United States (The Llama)*, (1925) 267 U. S. 76. So far as we have found, the earliest reported collision case in which the present clause was considered was *British and Foreign*

S. S. Co. Ltd. v. *The King (The St. Oswald-The Suffern)*, [1917] 2 K. B. 769, [1918] 2 K. B. 879 where the loss of the *St. Oswald* was held to be the proximate, direct and immediate consequence of the warlike operation of the French Battleship *Suffern*.

In the recent decision in *Yorkshire Dale S. S. Co. Ltd.* v. *Minister of War Transport (The Coxwold)*, [1942] A. C. 691, at page 697, the Lord Chancellor said (italics ours):

> "Before referring to other decisions of this House which bind us, I would call attention to the exact question raised by the terms of the charterparty in the present case. *The relevant contrast is not, strictly speaking, between marine risks and war risks.* The *Coxwold* accidentally stranded, that is to say, she was proceeding through the sea when the water under her bottom became too shallow to keep her afloat, and she consequently ran aground. No misfortune could be more marine in its nature than this, but *the question here is not whether this is a marine risk, but whether, granting that stranding is a marine risk, this stranding is not to be regarded as 'the consequence of warlike operations'.*"

To the same effect, Lord Wright in the same case, [1942] A. C. at p. 707.

In the recent Merchant Marine Act Amendment, Public Law 763, 81st Congress, 2nd Session, approved September 8, 1950, enacting war risk insurance provisions in connection with the present emergency, Congress took pains to define the term "war risks", as used in that Act, as follows:

> "(c) The term 'war risks' includes to such extent as the Secretary may determine all or any part of those losses which are excluded from marine insurance coverage under a 'free of capture and seizure' clause, or analogous clauses."

If the views expressed by the Court of Appeals below in the footnote at R. 104 were correct, no such definition would have been necessary. It was clear to Congress even at that late date, that the term "war risks" as used in the Act mentioned, required explicit definition in order to cover all the risks customarily excluded from marine insurance by an F. C. & S. Clause.

There is no foundation, therefore, for the statement of the Court below, R. 108, that the English rule would conflict with American decisions.

(f) *The Opinion of the Court of Appeals Below*

The Court of Appeals below by a complex course of reasoning reached the conclusion that the decision of the District Court should be reversed. The result is clear enough, but the precise ground for it is difficult to find, if it can be found at all.

We know from the Government's appeal brief below that its principal point was that the negligence of both vessels constituted the proximate cause of the collision. Compare the subsequent decision of *Libby, McNeil & Libby, etc.*, v. *The United States (The David W. Branch)*, (Ct. Cl. 1950) 87 F. Supp. 866, where that view, erroneous as has been shown, is clearly stated.

After a prolonged discussion of the English cases, and of the American cases, and after stating its reasons for disregarding the *Napoli* admonition, when the Court of Appeals below came to the point where it could be expected to state in precise terms the ground for decision, the Court stated, R. 112-113, that the result is "tolerably clear", recognized the concession that the *YMS-12* was engaged in a warlike operation at the time of the collision, correctly stated the question to be decided, and then instead of decid-

ing it, erroneously cited the *Meseck* case for something it did not hold. The Court then held that the stipulated facts failed to sustain the petitioner's burden of proof, but did not say why, except in so far as it might be suggested that the Court intended to hold, by its misconstruction of article 5 of the stipulation of facts (in disregard of the plain meaning of the language used) that ordinary navigating negligence was the proximate cause of the collision. R. 113.

If that is the ground of the decision below then it runs squarely against the established principles of basic insurance law in America and in England. And it should be noted that in *The Warilda* and *The Roanoke-The Trevanion*, the negligence was ordinary navigating negligence. Likewise, in *The Eastern Prince-USS Roustabout*.

We have already shown that Lord Wrenbury, to whose dictum in the *Petersham, supra*, the Court below attached considerable importance, R. 112, had resolved his own doubts by the time he wrote his concurring opinion in *The Warilda*, [1923] A. C. at pp. 307-309, about two years after his dictum in *The Petersham*. In the course of his *Warilda* opinion Lord Wrenbury made the following observations on the lack of effect of negligence in the insurance of a loss:

> "In *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* [1898] 2 Q. B. 114, it was decided that in the case of a policy of marine insurance, loss by stranding occasioned by the negligent navigation of the master was a loss in respect of which the underwriters were liable. The principle is that the underwriter insures against a loss occasioned by a peril of the sea, and that stranding is none the less a peril of the sea though brought about by negligent navigation. The negligence does not alter the character of the sea peril, which still remains the *causa proxima*. So if I insure my house against fire, or my carriage or car against road risks, the risk

that my servant may negligently set the house on fire, or that my driver may drive negligently and cause a collision, is exactly one of the risks against which I sought insurance. I insured against fire or collision. The fire or collision occurred and the insurance office is to bear that risk to my indemnity. The fire or the collision is the *causa proxima* of the loss—the negligence is a cause more remote. As regards sea peril, I may perhaps express it by saying that the underwriter insures against the sea peril, however it may happen—including, therefore, negligence of the master. It is otherwise if the loss occurs through the wilful negligence or wilful act of the assured. In that case the loss does not 'happen', but is caused by the assured himself, and, consequently, he cannot recover.

"Collision is a sea risk and art. 18 of the charter party holds the Admiralty not liable in the case of collision 'or any other cause arising as a sea risk'. But art. 19 renders it liable for 'all consequences of hostilities or warlike operations'. The question, therefore, is as between sea risk and war risk; was this loss a consequence of the warlike operation in which the vessel was engaged? Does the fact that the master was negligent render the loss one which was not a consequence of that warlike operation? In my judgment it does not. The principle of *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*: [1898] 2 Q. B. 114 applies. The operation in progress was the navigation of the ship; that operation was a warlike operation, and none the less because the operation was negligently conducted. The loss was occasioned by a warlike operation negligently performed. The Admiralty had insured against the consequences of warlike operations, however they might happen, including, therefore, negligence. The negligence did not alter the character of the operation, and the loss was a consequence of

> the warlike operation, which still remained the *causa proxima.*"

In treating the English authorities the Court below repeatedly emphasized the element of "sailing without lights" as though it were an element of a warlike operation. Such a circumstance, along with sailing in convoy, was held by the House of Lords not to constitute an element of warlike operation. *The Petersham* and *The Matiana*, [1921] A. C. 99. It was so held by this Court in *The Napoli*, *supra*. See also *Nordling* v. *Gibbon* (SDNY, 1945) 62 F. Supp. 932.

The Court below then interprets the English rule as requiring "both of the necessary elements". R. 106.

The difficulty with that statement is that it strives to inject a question of fact into what the English cases have held to be a matter of law. It is the uniform English rule that if the vessel is engaged in a warlike operation, and if she was an active agent in a collision or stranding, it follows that the movement of the vessel through the water on the warlike operation *is* "the dominant and effective cause of the resulting catastrophe", thus fulfilling the condition correctly stated by the Court of Appeals below at R. 105 as follows:

> "* * * To put it another way, not only must the vessel's mission be one of war, but the warlike character of its operation must be the dominant and effective cause of the resulting catastrophe."

The Court's emphasis on "sailing without lights" was in order to explain away the decisions which do not agree with its theory of causation. See the treatment of the English cases, *The Ardgantock*, [1921] 2 A. C. 141; *The Richard de Larrinaga*, [1921] 2 A. C. 141; *The Geelong*, [1923] A. C. 191. R. 106-107. Such a narrow view of the English authorities is erroneous in view of the decisions in *The Petersham*

and *The Matiana,* [1921] 1 A. C. 99 and the decision of this Court in *The Napoli, supra.*

In short, it is apparent that the Court below wished to interpret the English decisions, which hold that a collision or stranding is a consequence of a warlike operation, as being in part based on the fact that the vessel was sailing without lights (the present vessels carried proper lights), rather than the rule of law that the collision or stranding was the legal consequence of the warlike operation of the vessel so engaged.

In order to clear the way for its erroneous theory and conclusion, the Court of Appeals below was forced into misinterpretation of the record and authorities, which we summarize as follows:

(1) It stated in the first paragraph of the opinion that the collision was *due* to the faulty navigation of both vessels, R. 103; and later misconstrued Article 5 of the Stipulation of Facts herein, R. 80, in holding that the parties had agreed that *the cause* of this collision was the negligence on the part of both vessels, R. 113, in complete disregard of the fact that Article 5 of the Stipulation of Facts said only that the aforesaid collision "*was contributed to*" by the mutual fault therein described.

(2) It held that the negligence found below pursuant to said stipulation was ordinary negligence in navigation rather than as found by the District Court, negligence "under the circumstances" of the special and extraordinary conditions created by the warlike operation of mine sweeping, *Opinion*, R. 90, and, as set forth in the preceding articles of the stipulation.

(3) It repeatedly treated the war risk insurance clause "consequences of hostilities or warlike operations" as only "consequences of hostilities", with-

out reference to the additional words "or warlike operations", thus seeming to attempt to avoid or minimize the effect of the concession and finding below that the *YMS-12* was at the time of the collision actually engaged on the warlike operation of sweeping for enemy mines. R. 104, 105, 107, 108, 112, 113.

(4) It stated that the District Court decision in *Meseck Towing Lines, Inc. v. Excess Ins. Co. Ltd.*, (E.D.N.Y. 1948), 77 F. Supp. 790 was "On facts almost identical to those involved here * * *", R. 113, in order to make a show of authority for its erroneous theory. In the *Meseck* case the District Court found that the collision was not the consequence of a warlike operation, because it found as a fact that the submarine chaser was on relief from her station at sea to return to port for fuel, and was not engaged on a warlike operation at the time of the collision with the tug.* Here it was conceded and found by both courts below that the *YMS-12 was* actually engaged in the warlike operation of mine sweeping at the time of the collision.

(5) It treated petitioner's case as though founded on the absurd contention that war risk insurance is all-inclusive and covers all risks of whatever nature to a vessel engaged on a warlike operation, and as though the question here were one of marine insurance of ships devoted to missions of war, despite the fact that the case involves the exact reverse, i.e., war risk insurance on the *Worth-*

* The official report of the *Meseck* decision, 77 F. Supp. 790 is incomplete. It sets forth only what the Court included under the heading "Discussion". The findings of fact and conclusions of law, referred to at the end of the opinion, are not contained in the official report. These will be found at 1948 AMC 979-982. The fourth "conclusion of law" was as follows:

"(4) The collision with the *Frederick E. Meseck* in March 1944, inside the Narrows, occurred during one of the periodic relief periods of the SC 1294, before she had resumed her patrol duties, and at the time of collision the SC 1294 was not engaged in a warlike operation."

ington, a merchant vessel *not* devoted to a mission of war. R. 110.

(g) *Hypothetical Concessions by the Court Below*

After all the analyses of the English and American cases, the Court below made the following concessions, R. 112:

> "* * * Under our own authorities the war risk underwriters must be held liable for the loss of a ship which by faulty navigation has left a swept channel and hit a mine. And if a master negligently fails to black out his vessel, and the lights left on it enable a submarine to torpedo it, there would be little hesitation in calling the loss a consequence of hostilities. * * *"

These concessions give rise to further question. If negligence was an intervening cause in the present case, why not in the hypothetical cases put by the Court? Yet by some formula not made clear, the Court below in the hypothetical cases managed to get rid of negligence as a bar to war risk insurance. The Court admitted, as it was bound to do, that in the cases supposed the losses would clearly be covered by war risk insurance. But where is the distinction between the hypothetical cases and the present case? Is it because the loss is caused by an exploding mine or by a torpedo? There is no authority for the proposition that the present war risk insurance covers only losses by enemy mines, torpedoes or projectiles. The phrase "consequences of hostilities or warlike operations" shows by the words "or warlike operations" that the cover extends beyond the consequences of actual hostilities. It has already been shown that the English authorities unite on the view that damage actively done by a vessel moving through the water on a warlike operation is a consequence of that warlike operation. And we submit that it is an inexorable conclusion

that if the hypothetical cases put by the Court below would be covered by the present war risk insurance, then damage actively done by a vessel engaged on a warlike operation either to another vessel or to herself is also covered as the consequence of the warlike operation.

The concessions made by the Court below in the hypothetical cases at R. 112 destroy the basis of the Court's whole decision. For if negligence would be immaterial in the supposed cases of loss by a mine or by torpedo, then negligence is immaterial in any loss where a vessel engaged on a warlike operation is actively directed against another vessel, or an obstruction.

(h) *"Motivation" of the British decisions*

There was a suggestion from Government counsel in the District Court, which has reappeared at page 11 of the brief of the Solicitor-General in opposition to the petition for writ of *certiorari* herein, that the 1923 and 1929 decisions (*The Warilda* and *The Roanoke-The Trevanion*) upon which the petition in these cases placed considerable weight, "were not unmotivated by a national policy of shoring up the weakened financial structure of British marine insurance companies in the aftermath of World War I". That footless speculation, without a vestige of proof, should not pass unnoticed.

The suggestion apparently is that it was the plan of the House of Lords to protect marine underwriters by casting losses on the war risk underwriters. A review of the decisions not only makes that suggestion ridiculous but the implication is a serious reflection on the integrity of the House of Lords, whose decisions on maritime matters have always received the highest consideration of the American courts.

This Court in *The Napoli* followed the British decisions in *The Petersham* and *The Matiana*, both of which cast the loss upon the marine underwriters. There were many other similar decisions in which the marine underwriters, and not the war risk underwriter, were held liable, among *Adelaide S. S. Co. Ltd.* v. *The Crown (The Second Warilda)* [1926], A. C. 172 which will be discussed in our next point, *The Clan Matheson-The Western Front* (1929), A. C. 514, and *The Priam*, [1948] A. C. 243.

It is fairly demonstrable that the House of Lords has been much more concerned with stating a correct and practical rule of law than "shoring up the weakened financial structure of British marine insurance companies."

It is also stated in the same brief at page 10 that the question presented is no longer one of apportioning a risk between two private insurance companies. This obviously was intended as a reason for paying no further attention to the *Napoli* admonition. But examination of the English cases shows that the question was usually one between the marine underwriters on the one hand and The Crown, as war risk underwriter, on the other. The present case likewise is between a private shipowner and the Government.

(i) *Conclusion.*

We therefore submit, under the decisions of the House of Lords in *The Warilda* and *The Roanoke-The Trevanion* and of the United States Court of Appeals for the Ninth Circuit in *General Ins. Co. of America* v. *Link et al.*, (*The Eastern Prince-USS Roustabout*) pursuant to the admonition of this Court in *The Napoli*, that the collision herein was a consequence of the warlike operation of mine sweeping in which the *YMS-12* was then engaged, and thus within the terms of the *Worthington's* war risk insurance which covered "all consequences of hostilities or warlike operations".

SECOND POINT.

PETITIONER'S COLLISION LIABILITY HEREIN IS INSURED BY THE GOVERNMENT WAR RISK INSURANCE.

We respectfully request the Court to deal with this question as it involves only a question of law on the facts and insurance provisions found below.

The District Court held that the collision was a consequence of the warlike operations of the *USMS-12*, and that the terms of the government war risk endorsement insured petitioner against the collision liability. *Opinion*, R. 90-95.

The Court of Appeals below did not deal with this point. It held in effect that the war risk insurance never came into operation at all because the collision was not a "consequence of hostilities or warlike operations". *Opinion*, R. 113.

The war risk endorsement expressly referred to the risks covered by the Collision Clause, as follows:

> "* * * It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty. * * *"
>
> *War Risk Clauses*, Eleventh Finding of Fact, R. 83-84; *Government Ex.* 1-(c), R. 72, in evidence R. 32.

The second paragraph of the F. C. & S. Clause provided that a war risk endorsement if added later would supersede the F. C. & S. Clause to the extent that their terms are inconsistent. The second paragraph of the F. C. & S. Clause was rightly described by the District Court as a "subordi-

nation clause", *Opinion,* R. 94, and we shall so refer to it. It was as follows:

> *"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."*
>
> *Form of Policy,* Government Ex. 1-(c), R. 71, in evidence R. 32; Tenth Finding of Fact, R. 82.

The war risk endorsement, is made the dominant clause by the terms of the subordination clause.

Insofar as it includes the term "(including the Collision Clause)", the war risk endorsement is inconsistent with the F. C. & S. Clause.

The war risk endorsement directs that the risks excluded from the attached marine hull policy form by the F. C. & S. Clause contained therein shall include the risks covered by the Collision Clause. The provision "(including the Collision Clause)" supersedes, and thus must be read into, the F. C. & S. Clause. Being thus carried back into the F. C. & S. Clause by the effect of the subordination clause, it operates to include the risks covered by the Collision Clause among all other risks excluded from the marine hull insurance in any casualty which is a "consequence of hostilities or warlike operations".

The war risk endorsement then takes over and insures all risks so excluded from the marine hull policy, among them those of the Collision Clause.

In dealing with the subordination clause the District Court said:

> "This, in effect is a subordination clause whereby the scope of the 'F. C. & S.' clause must be read as coextensive with the undertaking contained in the war risk endorsement."
>
> . . . . . .
>
> "It appears that the whole purpose of the subordination was to make the exclusion of the 'F.C.&S.' clause commensurate with what was assumed by the war risk endorsement. The result is that the running-down liability for war risk collision is excluded from the marine policy and that the war risk underwriters assume the collision liability so excluded."
>
> **R. 94.**

Accordingly, the District Court properly held that the first paragraph of the F.C.&S. Clause as amended by the war risk endorsement by virtue of the subordination clause, should be deemed amended so as to read as follows:

> "Notwithstanding anything to the contrary contained in the Policy (including the collision clause), this insurance (including the collision clause), is warranted free from any claim for loss, damage, or expense caused by or resulting from . . . all consequences of hostilities or warlike operations . . ."
>
> **R. 94.**

There appears to be only one prior case on the subject of war risk insurance of collision liability, and that is the decision of the House of Lords in *Adelaide Steamship Co. Ltd.* v. *The Crown (the second Warilda)*, [1926] A. C. 172.* There the war risk insurance was accomplished by Clause 19 of the Requisition Charter of *The Warilda*. It may be convenient to set down in parallel form the insurance provisions of the second *Warilda* in contrast to the insurance provisions now before this Court, as follows:

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* See footnote *ante*, p. 17.

Warilda

[1926] A. C. at pp. 177-178

"19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:

'Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.'"

Worthington

R. 82-83

WAR RISK CLAUSES

* * * It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty. * * *

F. C. & S. Clause.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations. * * *.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

The distinction between the two forms of war risk contract is apparent from the comparison set forth above. In the present case there was an express reference to the Collision Clause of the marine hull policy form. In the second *Warilda* there was not any such provision.

In the second *Warilda* it was held that notwithstanding the fact that the collision with the *Petingaudet* was a consequence of warlike operations, the collision *liability* of the owner of the *Warilda* arose solely because of negligence; and that as such negligence is covered only by the Collision or "Running-Down" Clause of the policy, and as the Collision Clause of the policy is historically an appendage not originally part of the basic marine policy, *De Vaux* v. *Salvador*, 4 Ad. & E. 420; *Xenos* v. *Fox*, (1868) L. R. 3 C. P. 630, the F. C. & S. Clause did not operate upon it; that the collision liability was therefore not excluded by the F. C. & S. Clause, and accordingly was not taken over by the war risk contract.

The second *Warilda* did not involve any provisions, as here, which carried over to the Crown the burden of the *Warilda's* collision liability.

Because of a wide difference in the form of insurance contract the decision in the second *Warilda* does not govern the present case. The present case should be decided on the terms of its own form of contract.

This Court is now dealing with an entirely different set of provisions which unmistakably cast upon respondent as war risk underwriter the insurance of petitioner's collision liability.

If the words "(including the Collision Clause)" as inserted in the first paragraph of the war risk endorsement, and which are to be deemed included in the F. C. & S. Clause by amendment through the subordination clause, did

not mean that the collision liability risk covered by the Collision Clause was to be among the risks excluded from the marine policy form by the F. C. & S. Clause, then what did they mean? The whole purpose and scope of the Collision Clause is the "running-down" liability with respect to the vessel insured. If these words, inserted in the war risk endorsement in full light of the second *Warilda*, did not mean that the collision liability was to be covered by the war risk endorsement, then this clause, promulgated by the Government, is an absurdity. Such a result should not be accepted by this Court.

There is no ground for argument here, as was held in the second *Warilda*, that the collision liability of petitioner was due only to negligence and thus not within the cover of the war risk insurance, because the present war risk endorsement specifically refers to and insures the risks covered by the Collision Clause which covers loss due to liability. Liability arises only by reason of fault or negligence. Therefore the war risk endorsement, unlike that found in the second *Warilda*, expressly provided for insurance of loss by reason of liability due to negligence.

The insurance clauses here involved are perfectly clear as to meaning and scope. But in its appeal brief below the Government undertook a tortuous explanation of the meaning of the words "(including the Collision Clause)" as found in the war risk endorsement, and may do so here.

The gist of the Government's argument appears to be that the phrase "(including the Collision Clause)" was inserted only to identify a marine form of hull policy containing a Collision Clause. There is no substance to that suggestion because marine hull policies commonly include a Collision Clause; and the war risk endorsement expressly refers to "the attached policy" which in fact contained a

Collision Clause. There was no need for identification of the "attached" policy. Thus the Government would have the Court understand that the words "(including the Collision Clause)" were redundant, purposeless, and had no real meaning at all.

It is unnecessary to add that it is fundamental in insurance law that ambiguity in the forms of policy prepared and issued by the underwriter shall be resolved in favor of the assured.

National Bank v. *Insurance Company,* (1877) 95 U. S. 673, 678-679;
Hagan v. *Scottish Union & Natl. Ins. Co.,* (1902) 186 U. S. 423, 426;
London Assurance Co. v. *Companhia de Moagens do Barreiro,* (1897) 167 U. S. 149, 159;
Mutual Life Ins. Co. of New York v. *Hurni Packing Co.,* (1923) 263 U. S. 167, 174;
Strochmann v. *Mutual Life Ins. Co. of New York,* (1937) 300 U. S. 435, 439-440.

We therefore submit that respondent, under the war risk endorsement, insured petitioner's liability to respondent arising out of the collision between the *Worthington* and the *YMS-12.*

THIRD POINT.

PETITIONER IS ENTITLED TO INDEMNITY WITH RESPECT TO THE COSTS OF DEFENSE OF THE COLLISION LIBEL.

Again we respectfully request the Court to deal with a question not decided by the Court of Appeals below, because it involves only a matter of law on facts found below.

These cases present the unusual situation in which an underwriter has sued its assured on a claim covered by the insurance issued by the underwriter to the assured.

The District Court held that petitioner is entitled to indemnity by reason of the provisions of the war risk insurance already set forth. R. 95.

The Collision Clause of the marine hull policy form, *ante*, page 8, covers the costs of defense of the collision libel.

The war risk endorsement insures risks covered by the Collision Clause in any casualty which is a consequence of hostilities or warlike operations.

It was found below that petitioner notified respondent that it would look to respondent for full indemnity both as to collision liability and as to the costs of defense of respondent's collision libel in No. 27. *Letter*, Ex. A, *Thirteenth Finding of Fact*, R. 84-85; Ex. A, R. 76, in evidence R. 55.

The Government declined liability. *Letter, Fourteenth Finding of Fact*, R. 85-86; Ex. B, R. 77, in evidence R. 55.

When those letters setting forth notice and refusal were offered in evidence, Government counsel said that he thought the exchange of letters a "wholly useless and senseless gesture which has no bearing because we brought the action ourselves." R. 55.

Accepting that view for the time being, it follows that whether a demand was necessary or not, respondent is liable to indemnify petitioner against the costs of defense of the collision libel by reason of the express undertaking in the Collision Clause, as taken over and insured by the war risk endorsement, to pay such costs.

CONCLUSION.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN THESE CASES SHOULD BE REVERSED AND THE DECISION AND DECREE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK HEREIN SHOULD BE REINSTATED.

Dated, New York, September 20, 1950.

Respectfully submitted,

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